

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KELCI STRINGER,)
Plaintiff,)
v.) Case No. 2:03-cv-665
NATIONAL FOOTBALL LEAGUE,)
et al.,) Judge Holschuh
Defendants.) Magistrate Judge Abel

)

**MOTION TO DISMISS
OR ALTERNATIVELY FOR SUMMARY JUDGMENT
OF DEFENDANTS NATIONAL FOOTBALL LEAGUE, NFL PROPERTIES, LLC,
AND JOHN LOMBARDO, M.D.**

ORAL ARGUMENT REQUESTED

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendants National Football League, National Football League Properties, LLC, and Dr. John Lombardo (collectively, “the NFL Defendants”) hereby move to dismiss plaintiff’s claims against them. Those claims are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because their resolution would require interpretation of the Collective Bargaining Agreement between the National Football League Players Association and the NFL Management Council. In the alternative, the NFL Defendants move, pursuant to Federal Rule of Civil Procedure 56(b), for summary judgment on the same ground.

A memorandum in support of this motion and the supporting declaration of Dennis L. Curran and the exhibits thereto are submitted herewith. Because of the public importance of the

legal issues presented by this motion, the NFL Defendants respectfully request oral argument pursuant to Local Civ.R. 7.1(b).

s/ Richard A. Frye
Richard A. Frye (0011021), Trial Attorney
Sarah Daggett Morrison (0068035)
CHESTER, WILLCOX & SAXBE, LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213
(614) 334-6135/fax 221-4012
RFrye@CWSlaw.com

Gregg H. Levy (*pro hac vice*)
Benjamin C. Block (*pro hac vice*)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
(202) 662-6000/fax 662-6291
glevy@cov.com

Attorneys for Defendants National Football League,
NFL Properties, LLC, and John Lombardo, M.D.

MEMORANDUM IN SUPPORT

INTRODUCTION

This Motion is brought by the National Football League (“NFL”), NFL Properties LLC, and Dr. John Lombardo (collectively, “the NFL Defendants”).

Plaintiff’s claims against the NFL Defendants present a dispute over working conditions that arises under, and is governed exclusively by, the Collective Bargaining Agreement between the NFL member clubs and the National Football League Players Association (“NFLPA”). That Agreement provides an exclusive remedy -- arbitration -- for any and all claims, such as those presented here, that involve the terms and conditions of a player’s employment.

Accordingly, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, federal law preempts plaintiff's state law claims against the NFL Defendants and requires that those claims be dismissed.

STATEMENT OF THE CASE

A. The Allegations Of The Complaint.

Plaintiff is the widow of Korey Stringer, an NFL player who died during the initial days of the Minnesota Vikings' 2001 training camp. She is suing as the representative of Mr. Stringer's estate, on her own behalf, and purportedly on behalf of a class of similarly situated persons. Her "wrongful death/survivorship action" alleges:

- that the National Football League breached an asserted duty of care relating to its "member clubs' practices, policies, procedures, equipment, working conditions, and culture, insofar as they pertain to . . . heat-related illness, including, but not limited to, the duty to . . . regulate . . . practices, games, equipment, and medical care . . ." Compl. ¶ 30 (First Claim for Relief);
- that Dr. John Lombardo, who serves on the faculty of The Ohio State University and as a consultant to the NFL, breached an asserted duty to "develop and implement all necessary policies and procedures to protect [NFL players] from the risks of heat-related illness." Id. at ¶ 39 (Second Claim for Relief); and
- that the NFL and NFL Properties, "the licensing arm of the NFL," breached an asserted duty to ensure that the equipment worn by NFL players is "of the highest possible quality and sufficient to protect the players from the risk of injury, including . . . heat-related illness." Id. at ¶¶ 66-67. (Fourth Claim for Relief).

In addition to compensatory and punitive damages, plaintiff seeks: (1) to enjoin the NFL from requiring players to participate in certain practices and games and/or to use certain equipment, until "policies, procedures, acclimatization requirements, and equipment are developed and put in place for use in settings of high heat and humidity"; (2) to enjoin the NFL

and NFL Properties “from licensing, approving, or mandating or allowing the use of” certain equipment; and (3) to require the NFL and Dr. Lombardo “to establish mandatory procedures and programs . . . to reduce the risk of heat-related illness and to counteract the culture that contributes to it.” Id. at ¶ 72 (Fifth Claim for Relief).

B. The Collective Bargaining Agreement.

The terms and conditions of NFL players’ employment are governed by a collective bargaining agreement (“the CBA”) between the NFL Management Council (the exclusive bargaining representative of the NFL clubs) and the NFLPA, “which is recognized as the sole and exclusive bargaining representative of present and future employee players in the NFL.” Declaration of Dennis L. Curran, dated October 27, 2003 (attached hereto), Ex. A, Preamble. The CBA, which “represents the complete understanding of the parties on all subjects covered [t]herein,” id. Art. III, § 1, is binding on all players’ “heirs, executors, administrators, [and] representatives,” id. Art. LV, § 14.¹

Among other things, the CBA (1) addresses a wide range of issues relating to pre-season training camps;² (2) affords players rights to medical care, including a comprehensive mandatory pre-season physical examination;³ (3) establishes a Joint Committee on Player Safety and Welfare (comprised of NFL and player representatives) to address issues concerning player

¹This Court can consider the CBA in ruling on this Motion To Dismiss because its authenticity cannot be disputed, and because plaintiff’s claims against the NFL Defendant necessarily rely on the CBA, as we demonstrate below. See Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998); Weiner v. Klais & Co., 108 F.3d 86, 89 (6th Cir. 1997). Alternatively, this Court may treat this motion as one for summary judgment. See Johnson v. Delphi Corp., 261 F. Supp. 2d 955, 958 n.4 (S.D. Ohio 2003).

²See CBA Art. XXXVII; id. App. C, ¶ 2.

³See id. Art. XLIV & App. I.

safety, including the “player safety and welfare aspects of playing equipment”;⁴ (4) prescribes the standard form NFL Player Contract;⁵ and (5) addresses a player’s right to compensation and benefits in the event of death while performing football services.⁶

Finally and importantly, the CBA contains a broad arbitration provision that addresses not only disputes arising from the CBA itself, but also disputes arising from (1) an NFL Player Contract or (2) any provision of the NFL Constitution and Bylaws that relates to terms and conditions of NFL players’ employment:

Any dispute (hereinafter referred to as a “grievance”) arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the [arbitration] procedure set forth in this Article

Id. Art. IX § 1 (emphasis added). Pursuant to the CBA, each NFL Player Contract reiterates the obligation to arbitrate any disputes over the terms or conditions of the player’s employment. See id. App. C, ¶ 19.

STANDARD OF REVIEW

In ruling on a Motion to Dismiss pursuant to Rule 12(b)(6), this Court “must construe the complaint in a light most favorable to the plaintiff, accept his or her factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of [her] claims that would entitle [her] to relief.” Bibbo v. Dean Witter Reynolds, Inc., 151 F.3d 559,

⁴See id. Art. XIII, § 1(a).

⁵See id. Art. XIV & App. C.

⁶See id. Art. IX (Non-Injury Grievance); id. Art. X (Injury Grievance); id. Art. XII (Injury Protection); id. Art. XLIX, § 1(a) (Life Insurance); id. Art. L (Severance Pay); id. Art. LII (Benefit Arbitrator).

561 (6th Cir. 1998). However, this Court need not accept any “legal conclusions or unwarranted factual inferences” contained in the Complaint. Gean v. Hattaway, 330 F.3d 758, 765 (6th Cir. 2003). When, as is the case here, a plaintiff’s claims are preempted by federal law, dismissal under Rule 12(b)(6) is the proper disposition. See Bibbo, 151 F.3d at 564.

ARGUMENT

The complaint carefully avoids identifying the source of the duty allegedly owed by the NFL Defendants to Korey Stringer.

The source is plainly not Mr. Stringer’s employment relationship. He was not employed by any of the NFL Defendants, but rather by the Minnesota Vikings Football Club, LLC. See Compl. ¶ 11. Indeed, plaintiff has already sued the Vikings for claims similar to those presented here; those claims were dismissed by a Minnesota court, which held that such claims were barred by Minnesota’s Workman’s Compensation laws in Stringer v. Minnesota Vikings Football Club, No. 02-00415, slip op. at 5-7 (Minn. Dist. Ct. Apr. 25, 2003) (attached), an opinion of which this Court may take judicial notice. See New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003).

The source is plainly not the medical treatment that Mr. Stringer received at the time he fell ill. There is no allegation that any of the NFL Defendants provided medical care to him at that time. Indeed, plaintiff has already sued the clinic where Mr. Stringer was treated as well as the physicians who treated him. Some of those claims were dismissed; others were settled. See Stringer, No. 02-00415 at 5-7.

Instead, the only realistic potential source of such a duty is the CBA, which addresses at length the terms and conditions of NFL players’ employment, which “represents the complete

understanding of the parties on all subjects covered [t]herein,” CBA, Art. III, § 1, and which incorporates by reference the NFL Constitution and Bylaws, see id. Art. III, §1, Art. IV, § 2.⁷

The very essence of plaintiff’s claims against the NFL Defendants leaves no doubt that any such duty could arise, if at all, only from the CBA. Plaintiff’s allegations against the NFL Defendants focus on training camp “working conditions,” a term that appears nearly a dozen times in the Complaint. See Compl. ¶¶ 2, 3, 19, 22, 30. In unionized industries, working conditions are the stuff of collective bargaining agreements. See 29 U.S.C. § 151 *et seq.* (National Labor Relations Act). Indeed, by requesting injunctive relief that would alter the working conditions of NFL Players, plaintiff seeks to displace the NFLPA, which is recognized as the “sole and exclusive bargaining representative of present and future employee players in the NFL.” CBA Preamble.

In short, because interpretation of the CBA would be necessary to determine whether any such duty existed and, if so, whether that duty was breached, plaintiff’s claims against the NFL Defendants are preempted by federal labor law and may proceed, if at all, only in arbitration, the exclusive remedy established by the CBA for resolving such claims.

I. PLAINTIFF’S ACTION IS PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT.

The Supreme Court has consistently held that Section 301 of the Labor Management Relations Act (“LMRA”) preempts state law claims, including tort claims, that call for the interpretation and/or application of a collective bargaining agreement or related agreements. E.g., United Steelworkers of Am. v. Rawson, 495 U.S. 362, 368-69 (1990); Int’l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 858-60 (1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202,

⁷The Constitution and Bylaws were “bargained over and included within the scope of the CBA.” Brown v. Nat’l Football League, 219 F. Supp. 2d 372, 386 (S.D.N.Y. 2002).

212 (1985); Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557 (1968); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). Accordingly, “when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a Section 301 claim, or dismissed as pre-empted by federal labor-contract law.” Allis-Chalmers, 471 U.S. at 220 (citation omitted).⁸

In determining whether Section 301 preemption applies, the Sixth Circuit has prescribed a two-step approach: the court (1) must “examine whether proof of the state law claim requires interpretation of the collective bargaining agreement terms”; and (2) must “ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law.” DeCoe v. Gen. Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994). If either criterion applies, the state law claim is preempted. See id. Plaintiff’s claims against the NFL Defendants cannot satisfy either element of this test.

A. Plaintiff’s Claims Are Preempted Because Their Proof Would Require Interpretation of the CBA.

“Only if the Plaintiff can prove all the elements of her claim without requiring the court to examine the CBA does her claim escape preemption.” Beckwith v. Diesel Tech., Co., No. 99-1548, unreported, 2000 WL 761808, at *3 (6th Cir. May 30, 2000); see also DeCoe, 32 F.3d at

⁸The Sixth Circuit has routinely applied the foregoing principles to hold that state law claims, such as the ones asserted against the NFL Defendants, are preempted and must be dismissed. Fox v. Parker Hannifin Corp., 914 F.2d 795, 799-800 (6th Cir. 1990) (Section 301 preempts state law negligence claims that are “substantially dependent on analysis of a collective-bargaining agreement”); In re Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local No. 173, 983 F.2d 725, 729 (6th Cir. 1993) (employee’s claims of negligence, malpractice, fraud, collusion and tortious interference with contractual relationship preempted), Michigan Mutual Ins. Co. v. United Steelworkers of Am., 774 F.2d 104 (6th Cir. 1985) (dismissing as preempted employee wrongful death claims alleging that union had negligently performed assumed duty of providing for a safe workplace).

216-17.⁹ Here, plaintiff's claim against the NFL Defendants would necessarily require this Court to examine the CBA to determine if the NFL Defendants owed any duty to Mr. Stringer (and, if so, to determine whether the NFL Defendants breached such a duty).

The essence of plaintiff's claim is a wrongful death action sounding in negligence. Regardless of whether it is examined under Ohio law pursuant to Chapter 2125 of the Ohio Revised Code or under Minnesota law, the action requires proof of (1) the existence of a duty; (2) a breach of that duty; and (3) proximate causation between the breach of the duty and the death. See, e.g., Armstrong v. Best Buy Co., 99 Ohio St.3d 79, 81, 788 N.E.2d 1088, 1090 (2003); Littleton v. Good Samaritan Hosp. & Health Ctr., 39 Ohio St.3d 86, 92, 529 N.E.2d 449, 454 (1988); Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982). Although plaintiff nowhere specifies the nature or source of the alleged duty, only the CBA -- which represents "the complete understanding of the parties on all subjects covered [t]herein," Art. III, § 1 -- could constitute such a source.

Several examples illustrate the point. Plaintiff alleges, for instance, that the "NFL and Dr. Lombardo have failed to require that an adequate heat-related illness history be taken by those providing medical services . . . to players." Compl. ¶ 21(d). But the Collective Bargaining Agreement provides for a "standardized minimum pre-season physical examination" (CBA, Art. XLIV, § 5), including a medical history of the player, his family, and a "thorough review of all team physicians and trainer reports for preceding seasons." CBA, App. I. As a result, plaintiff's claim could not possibly be proved without "requiring the court to examine the CBA."

⁹In making this inquiry, the court "is not bound by the 'well-pleaded complaint' rule, but rather, looks to the essence of the plaintiff's claim." DeCoe, 32 F.3d at 216.

Similarly, plaintiff alleges that the NFL requires NFL players “to submit to the medical care provided and deemed necessary by member clubs.” Compl. ¶ 16. But the CBA includes an entire article addressing “Players’ Rights To Medical Care and Treatment,” including the right to “a second medical opinion.” CBA, Art. XLIV. Here, too, plaintiff’s claim could not possibly be proved without “requiring the court to examine the CBA.”

The complaint further alleges that the NFL and Dr. Lombardo have “condoned and, indeed, forced players to submit to a substandard medical system within the NFL that is composed of athletic trainers . . . who are not competent or adequately trained.” Compl. ¶ 21(h). But the Collective Bargaining Agreement requires that “full-time head trainers and assistant trainers . . . be certified by the National Athletic Trainers Association [and that] [a]ll part-time trainers must work under the direct supervision of a certified trainer.” CBA, Art. XLIV, § 2. Again, this claim could not be proved without “requiring the court to examine the CBA.”

As a final example, the complaint alleges that the NFL and Dr. Lombardo “have failed to regulate team policies, practices and procedures regarding . . . return to practice, insofar as such matters pertain to heat-related illness among players.” Compl. ¶ 21(f). But the CBA in fact regulates those policies, practices, and procedures by providing, for example, that if a player’s “physical condition . . . could be significantly aggravated by continued performance, the physician will advise the player of such fact in writing before the player is again allowed to perform on-field activity.” CBA, Art. XLIV, § 1. This claim, too, could not be resolved without “requiring the court to examine the CBA.”

All of these alleged “duties” involve asserted obligations of the NFL Defendants to NFL players. Plaintiff does not, and could not reasonably, allege that the NFL Defendants owed any such duties to members of the general public. Accordingly, this case is analogous to and

controlled by the Supreme Court's decision in Rawson, a wrongful death action brought by the next-of-kin of mineworkers fatally injured in a mining accident. See 495 U.S. at 365. Their complaint alleged that the union had failed to adequately inspect the mine. See id. (There the collective bargaining agreement between the union and the mine established a joint management-labor safety committee that was responsible for inspecting the mines. See id. at 366.) The Court held that Section 301 preempted the state law wrongful death action because any duty the union could have failed to perform had to arise, if anywhere, from the collective bargaining agreement. See id. at 369. The Court noted:

As we see it . . . respondent's tort claim cannot be described as independent of the collective bargaining agreement. This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society.

Id. at 371 (emphasis added); see also In re Gen. Motors Corp., 3 F.3d 980, 985 (6th Cir. 1993) (invasion of privacy claim preempted by LMRA and ERISA since claim was based on employee assistance program which provided services "beyond those available to the general public"); Brown v. Nat'l Football League, 219 F. Supp. 2d 372, 380 (S.D.N.Y. 2002) ("To be independent of the CBA, a tort claim must allege a violation of a duty 'owed to every person in society,' as opposed to a duty owed only to employees covered by the collective bargaining agreement.").¹⁰

¹⁰In Brown, plaintiff alleged that an NFL referee had negligently thrown a weighted penalty flag, injuring him in the eye. 219 F. Supp. 2d at 381. He claimed that the NFL had breached "its duty to him and to the general public" to employ, train, and supervise competent referees, and to ensure that penalty flags not be unsafely weighted or thrown improperly. Id. at 376 (citing complaint, emphasis added). Because the acts alleged would have given rise to a claim even if the plaintiff had not been an NFL player -- e.g., "had a fan attending the game been struck by a negligently thrown penalty flag, there is no question that a cause of action would [arise]" (id. at 382) -- the duty there was deemed independent of the CBA. As the discussion in the text confirms, the situation presented here is fundamentally different because, as alleged in the Complaint, any duty of the kind alleged here could run only to NFL players.

The similarity between this case and Rawson is striking. As in Rawson, the CBA here establishes a labor-management committee on worker safety -- the Joint Committee on Player Safety and Welfare. See CBA, Art. XIII, § 1. Plaintiff's claim, in essence, is that this Committee failed to adequately perform its function; proof would require an examination of the duties of the Committee, which in turn will necessitate interpretation of the CBA. See Rawson, 495 U.S. at 371.

The Supreme Court's decision in Hechler is also instructive. In that case, the plaintiff alleged that her union had negligently failed to "provid[e] and/or enforc[e] safety rules, regulations and requirements" at her workplace, which resulted in bodily injury. 481 U.S. at 861 (alterations in original). The Supreme Court ruled that her claim was preempted by Section 301:

In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint.

481 U.S. at 861-62.

As in Hechler, plaintiff here complains that Mr. Stringer's death was the result of unsafe conditions at his workplace, resulting from an asserted lack of safety rules and procedures. As in Hechler, any duties (and the nature and scope thereof) owed here must arise, if at all, from the CBA. See Hechler, 481 U.S. at 861 (noting that plaintiff's "allegations of negligence assume significance if -- and only if -- the Union, in fact, had assumed the duty of care that the complaint alleges [it] breached. The collective-bargaining agreement . . . contain[s] provisions on safety and working requirements . . . on which [plaintiff] could try to base an argument that the Union assumed an implied duty of care" (footnote omitted)).

The Sixth Circuit's analysis in Fox is also on point. There, plaintiff claimed that both her employer and her union were negligent in fulfilling obligations under the applicable collective bargaining agreement. See 914 F.2d at 801. The Sixth Circuit held that Section 301 preempted this negligence claim because "the underlying duty [alleged] arises directly from the CBA." Id. The court went on to note that, as in Rawson, "this is not a situation where the Union's and the Company's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society." Id. (internal quotations and alterations omitted).

Hence, plaintiff's claims against the NFL Defendants fail the first prong of the DeCoe test and are therefore preempted by the LMRA. See 32 F.3d at 216.

B. Plaintiff's Claims Are Preempted Because The Legal Duties Alleged Could Be Founded Only Upon The CBA.

Plaintiff's claims against the NFL Defendants also fail the second prong of the DeCoe test. Under this prong, "preemption is required [even] when resolution of [the plaintiff's] claim will not involve the direct interpretation of a precise term of the CBA" if the court must "address relationships that have been created through the collective bargaining process and to mediate a dispute founded upon rights created by a CBA." DeCoe, 32 F.3d at 218 (quoting Jones v. General Motors Corp., 939 F.2d 380, 382-83 (6th Cir. 1991)) (internal quotations omitted).

As a general matter, plaintiff challenges the terms and conditions of Mr. Stringer's employment. But his relationship with the NFL Defendants was created through the collective bargaining process that, among other things, established the form of the player contract governing Mr. Stringer's employment with the Vikings, see CBA, Art. XIV & App. C, and which, as described below, created a process for resolving any disputes related to those terms or conditions.

To cite an example, plaintiff challenges the quality of medical care that Mr. Stringer received. But his right to medical care was created by the CBA. See id. Art. XLIV & App. I. Similarly, plaintiff challenges the failure of the NFL and Dr. Lombardo to prescribe policies and procedures for player safety, an allegation that directly implicates the duties of the Joint Committee, an entity created by the collective bargaining process. See id. Art. XIII, § 1.

Accordingly, plaintiff's claims fail the second prong of the DeCoe test as well. See 32 F.3d at 218 (holding that tort claim addressing a relationship created by a collective bargaining agreement was preempted even though proving elements of that claim did not necessitate interpretation of the agreement.)

II. PLAINTIFF'S PREEMPTED CLAIMS AGAINST THE NFL DEFENDANTS MUST BE DISMISSED.

Because plaintiff's claims against the NFL Defendants are preempted by Section 301 of the LMRA, “this suit, if it is to go forward at all, must proceed as a case controlled by federal, rather than state, law.” Rawson, 495 U.S. at 372. And because the CBA “affords the single mechanism [arbitration] for pursuing, reviewing, and resolving the grievances at the heart” of plaintiff's claims against the NFL Defendants, Fox, 914 F.2d at 802, those claims must be dismissed.

To the extent that plaintiff has any claim for a violation of Section 301, her action comes squarely within the scope of the CBA's arbitration provision, which is the “exclusive[]” method prescribed for resolution of “[a]ny dispute” involving “the interpretation of, application of or compliance with, any provision of [the CBA], the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL Players.” CBA, Art. IX, § 1. See Allis-Chalmers, 471 U.S. at 220-21 (noting that tort claim should have been “dismissed for failure to make use of the grievance procedure established

in the collective-bargaining agreement, . . . or dismissed as pre-empted by § 301” (citation omitted)).

On this basis, and because the CBA requires arbitration of such disputes, federal courts have consistently dismissed state law claims alleging that NFL players had incurred injuries while performing services pursuant to an NFL Player Contract. See, e.g., Smith v. Houston Oilers, Inc., 87 F.3d 717, 720-21 (5th Cir. 1996) (dismissing claims arising out of NFL player’s compelled participation in CBA-sanctioned rehabilitation and conditioning program); Holmes v. Nat’l Football League, 939 F. Supp. 517, 527-28 (N.D. Tex. 1996) (dismissing fraud and tort claims arising out of administration of NFL drug program adopted as part of CBA); Sherwin v. Indianapolis Colts, Inc., 752 F. Supp. 1172, 1178 (N.D.N.Y. 1990) (dismissing claims for negligence and medical malpractice arising out of injuries sustained by NFL player and resulting treatment by club doctors since duty to provide medical care to players did not exist independent of the CBA).

These principles are particularly compelling here in light of (1) the broad arbitration provisions in the CBA and the NFL Player Contract and (2) the strong federal policy favoring arbitration, especially in the context of labor disputes. Recognizing that strong federal policy, the Supreme Court and the Sixth Circuit have consistently held that a dispute may not proceed in court if a potentially applicable arbitration clause is “susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960) (footnote omitted); see also Gen. Drivers, Salesmen & Warehousemen’s Local Union No. 984 v. Malone & Hyde, Inc., 23 F.3d 1039, 1043 (6th Cir. 1994) (“National labor policy favors arbitration, and where the parties to a collective bargaining agreement have agreed to submit to arbitration, . . . and the agreement,

accordingly, contains an arbitration clause, there is a presumption of arbitrability.” (citation omitted)); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. United Screw & Bolt Corp., 941 F.2d 466, 472 (6th Cir. 1991) (“In interpreting an arbitration clause in a collective bargaining agreement, there is a strong presumption of arbitrability, any doubts should be resolved in favor of coverage.”); Jefferson Pilot Sec. Corp. v. Blankenship, 257 F. Supp. 2d 962, 964-65 (N.D. Ohio 2003).¹¹

The legal principles set forth above are not affected by the fact that plaintiff has styled this claim as one for wrongful death; as noted above, the CBA is binding on players’ “heirs, executives and administrators.” CBA Art. LV, § 14. In any event, courts have routinely found that wrongful death actions are preempted and must be dismissed when resolution of the claim required reference to -- or the alleged duty may have stemmed from -- a collective bargaining agreement. See, e.g., Rawson, 495 U.S. at 370; Michigan Mut. Ins., 774 F.2d at 106; Burgos v. S.W. Bell Tel. Co., 20 F.3d 633 (5th Cir. 1994); Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1063 (9th Cir. 1989). Accordingly, Plaintiff’s claims against the NFL Defendants must be dismissed.

¹¹On this basis, federal and state courts have consistently dismissed claims arguably subject to arbitration under the NFL CBA (or its predecessor). See Cincinnati Bengals, Inc. v. Thompson, 553 F. Supp. 1011, 1015-16 (S.D. Ohio 1983) (enforcing arbitration clause even though CBA had expired); Dryer v. Los Angeles Rams, 709 P.2d 826, 830 & n.5 (1985) (compelling arbitration because “[e]ven if Dryer’s dispute were not so clearly arbitrable under the language of the contract, doubts are to be resolved in favor of arbitrability”); Miami Dolphins, Ltd. v. Cowan, 601 So.2d 301, 301-02 (Fla. Dist. Ct. App. 1992) (compelling arbitration of claim for signing bonus under deceased player’s contract notwithstanding asserted delay of Club in moving for arbitration).

CONCLUSION

For the foregoing reasons, the NFL Defendants respectfully submit that the claims against them should be dismissed or, in the alternative, that summary judgment should be granted in their favor.

s/ Richard A. Frye
Richard A. Frye (0011021), Trial Attorney
Sarah Daggett Morrison (0068035)
CHESTER, WILLCOX & SAXBE, LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213
(614) 334-6135 / (614) 221-4012 (fax)
RFrye@CWSlaw.com

Gregg H. Levy (*pro hac vice*)
Benjamin C. Block (*pro hac vice*)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
(202) 662-6000 / (202) 662-6291 (fax)
glevy@cov.com

Attorneys for Defendants National Football League, NFL Properties, LLC, and John Lombardo, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for to Dismiss and Memorandum in Support were served by the Court's CM/ECF system and by U.S. mail, postage prepaid, on this 27th day of October, 2003, upon the following:

Stanley M. Chesley, Trial Attorney
Paul M. DeMarco
1513 Fourth & Vine Tower
Fourth and Vine Streets
Cincinnati, Ohio 45202
Counsel for Plaintiff

Robert Tucker
TUCKER, ELLIS & WEST
1150 Huntington Bldg.
925 Euclid Avenue
Cleveland, Ohio 44115
Counsel for Attorneys for Defendants Riddell, Inc.
and All American Sports Corporation

s/ Sarah Daggett Morrison
Of Counsel